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# Does Judicial Selection Method Affect Volatility?: A Comparative Study of Precedent Adherence in Elected State Supreme Courts and Appointed State Supreme Courts

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DOES JUDICIAL SELECTION METHOD AFFECT VOLATILITY?: A  
COMPARATIVE STUDY OF PRECEDENT ADHERENCE IN ELECTED STATE  
SUPREME COURTS AND APPOINTED STATE SUPREME COURTS

*Allen Lanstra*

I proceed to lay it down as a rule, that one man of discernment is better fitted to analyse and estimate the peculiar qualities adapted to particular offices, than a body of men of equal, or perhaps even of superior discernment.<sup>1</sup>

[E]lected benches are reactive to public opinion, while appointed courts, insulated from opinion's lowest common denominator, are freer to adopt unpopular policies.<sup>2</sup>

INTRODUCTION

A growing concern among many judicial observers as well as the general public, is the tone of campaigns for the election of our state supreme court justices.<sup>3</sup> The political polarization created by election campaigns has caused an increased attention by both the legal profession and the voting public to the selection of high court judges.<sup>4</sup> Recently, Michigan Governor John Engler even called for a state constitutional amendment to change Michigan's judicial selection method for the state supreme court from elected to appointed.<sup>5</sup> In addition, the overturning of precedent by state courts of

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<sup>1</sup> THE FEDERALIST NO. 76 (Alexander Hamilton).

<sup>2</sup> DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY 3 (1995).

<sup>3</sup> See, e.g., William Glaberson, *Justices Urge Stricter Rules for Judicial Elections*, N.Y. TIMES, Jan. 26, 2001, at A16; T.C. Brown, *Top Judge Wants Ad Campaign Backers Identified*, THE PLAIN DEALER, Dec. 12, 2000; Aaron Chambers, *Voter education, court rules, legislation all being tried to improve judicial elections*, CHICAGO DAILY LAW BULLETIN, Sept. 8, 2000.

<sup>4</sup> See, e.g., Robert Tanner, *Plenty of work ahead for 2001 legislatures*, THE SANTE FE NEW MEXICAN, Jan. 2, 2001; Chris Stirewalt, *Lawyers donate most to judicial candidates*, CHARLESTON DAILY MAIL, May 6, 2000; Lawrence Messina, *Underwood voices support for nonpartisan judicial elections*, THE CHARLESTON GAZETTE, Jan. 13, 2000.

<sup>5</sup> See Governor John Engler, State of the State Address (Jan. 31, 2001), available at <http://www.state.mi.us/migov/gov/speeches/stateofthestate>.

last resort is often carefully scrutinized for potential political underpinnings, both ideologically and strategically:<sup>6</sup>

The Engler majority on the Michigan Supreme Court has assaulted the cornerstone of our system of law: the rule of precedent. In the last year and a half, the Engler majority has overruled 38 precedents (20 distinct precedents of the state Supreme Court and 18 precedents of the Michigan Court of Appeals). This breathtaking pace is inconsistent with a fundamental purpose of the law: to provide an anchor of stability in shifting political winds.

Equal treatment under the law requires similarly situated citizens to be treated similarly. We do not expect our rights to change with each new court appointment. If the rights of citizens and businesses change with each new judge, we cease to be a government of law and become a government of individuals.

Courts have no credibility if rulings depend not on principle, but on political affiliation of judges. With the erosion of precedent, permanence and predictability comes the erosion of the respect and confidence of the people.<sup>7</sup>

But are initially elected courts likely to be more volatile than initially appointed courts? Are initially appointed courts more volatile than initially elected courts? This paper compares the volatility of the two most common high court placement systems used in our states – initial selection by popular election and initial selection by appointment, by measuring adherence to the principle of stare decisis.<sup>8</sup>

This paper: (1) Reviews stare decisis, the principle of following judicial precedent, and classifies the different systems used by our states to select the members of their highest courts; (2) Describes the process by which the volatility data of a state's

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<sup>6</sup> See, e.g., Opinion, *Changing Campaigns is Possible*, WISCONSIN STATE JOURNAL, June 1, 1999.

<sup>7</sup> Letter to the Editor, *Overruling precedent undermines law*, DETROIT NEWS, Nov. 8, 2000. The letter was authored by the following law professors: Patrick A. Keenan, Robert N. Brown, and Alan Saltzman, University of Detroit Mercy School of Law; Robert J. Sedler, Wayne State University Law School; Elliot B. Glicksman, Thomas M. Cooley School of Law. See *id.* The letter was written in response to a Detroit News editorial on the nasty 2000 Michigan Supreme Court elections that asked "What is all the hysteria really about?" See Editorial, *High Court: Election Hysteria*, DETROIT NEWS, Nov. 1, 2000.

decisions is collected and analyzed in this study; (3) Presents the data collected in this study; (4) Statistically analyzes the results; and (5) Provides cautious deductions from the study.

# I. STARE DECISIS AND THE VALUE IN UNDERSTANDING HOW JUDICIAL SELECTION METHODS AFFECT ADHERENCE TO THE DOCTRINE

The doctrine of stare decisis emulates the Latin phrase "*stare decisis et non quieta movere* – stand by the thing decided and do not disturb the calm."<sup>9</sup> In short, the principle of stare decisis in the law means that once a court has decided a matter, later courts should abide by the decision of the previous court.<sup>10</sup>

Although adherence to the doctrine is not required by our courts, stare decisis very much drives the legal system. "Most lawyers, by training and practice, are all too apt to turn their interests and their talents toward the finding not the creating of precedents."<sup>11</sup> In addition, some judges are attached to the doctrine and others find it to be a safe retreat when presented with difficult decisions.<sup>12</sup>

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<sup>8</sup> "One measure of stability is the extent to which precedents are overruled." William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 739 (1949).

<sup>9</sup> James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, The Constitution, and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986).

<sup>10</sup> See BLACK'S LAW DICTIONARY 712 (6th ed. 1990) (stare decisis means "[t]o abide by, or adhere to, decided cases").

<sup>11</sup> Douglas, *supra* note 8, at 735.

<sup>12</sup> For example, the joint opinion held that what tipped the scales in favor of reaffirming *Roe v. Wade* in *Planned Parenthood v. Casey* was stare decisis. See *Planned Parenthood v. Casey*, 505 U.S. 833, 901 (1992) ("Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. . . . We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents." *Id.* at 1091). "[S]tare decisis has always been a doctrine of convenience, to both conservatives and liberals." Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988).

Many noted scholars have debated the scope and importance of stare decisis,<sup>13</sup> but a thorough balancing of the scholarly thoughts on the proper extent of the doctrine's application is beyond the scope of this paper. Yet, in order to introduce the value of the results of this survey in the face of the current and historical debate about whether elected or appointed state supreme courts are better, a brief analysis of stare decisis is in order.

Although debate exists on the extent and proper limits of the doctrine, it is uncontroversial that the sturdiness that the doctrine provides to our system of law is essential to our legal framework.

Uniformity and continuity in law are necessary to many activities. If they are not present, the integrity of contracts, wills, conveyances, and securities is impaired. And there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon. *Stare decisis* provides some moorings so that men may trade and arrange their affairs with confidence. *Stare decisis* serves to take the capricious element out of law and to give stability to a society.<sup>14</sup>

Against the background of known rules, the people and the political branches of our governments can plan transactions, statutes, and campaigns of constitutional change.<sup>15</sup> Disruption of the rules, especially constitutional rules, interferes with such planning.<sup>16</sup>

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<sup>13</sup> "Holmes' famous remark that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,' reflects a similarly contemptuous attitude toward the claims of precedent." Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1035 (1990) (quoting OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 187 (1920)). "[I]f there is any principle that is fundamental to the true conservative, if there is any doctrine that is inviolable to the true conservative, if there is any rule that is cardinal to the true conservative, it is stare decisis." Cooper, *supra* note 12, at 401.

<sup>14</sup> Douglas, *supra* note 8, at 735-36.

<sup>15</sup> See Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 430 (1988).

<sup>16</sup> See *id.*

The most common problems with the failure to adhere to precedent in this regard can be categorized as “retrospective uncertainty” and “prospective uncertainty.”<sup>17</sup> With retrospective uncertainty, organizations or persons may be penalized for acting (or not acting) in reliance upon then-existing court decisions.<sup>18</sup> The party could be penalized if the law changes after the action is taken but before the action is examined by a court.<sup>19</sup> Uncertainty problems can also be prospective.<sup>20</sup> When a court overrules precedent or turns the course of law in a new unexpected direction, parties are left to guess as to the meaning or scope of the new doctrines until later court decisions can clarify the law.<sup>21</sup>

On the other hand, there is merit in abandoning bad precedent, regardless of its age.<sup>22</sup> Proponents of a more liberal adherence to stare decisis suggest that absolute rigid adherence “would leave the resolution of every issue in constitutional law permanently at the mercy of the first Court to face the issue, without regard to the possibility that the relevant case was poorly prepared or that the judgment of the Court was simply ill-considered.”<sup>23</sup> The dangers of strict adherence can be easily illuminated in cases where a court has moved too far in an activist direction proponents suggest; correction of the error may be virtually impossible under an inflexible stare decisis doctrine.<sup>24</sup>

Further, a more adaptable stare decisis doctrine has often been offered in cases involving constitutional law, since there is a “perception that the political branches are unable to alter the effects of erroneous constitutional decisions,” although this perception

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<sup>17</sup> See Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wts. L. REV. 467, 472-73 (1980).

<sup>18</sup> See *id.* at 472.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* at 473.

<sup>21</sup> See *id.* at 476.

<sup>22</sup> See Easterbrook, *supra* note 15, at 424.

<sup>23</sup> Maltz, *supra* note 17, at 492-93.

<sup>24</sup> See *id.* at 493.

is not universally correct.<sup>25</sup> Cases like *Plessy v. Ferguson*<sup>26</sup> and *Lochner v. New York*<sup>27</sup> come to mind as deserving of being overruled.

Although this brief presentation of the doctrine of stare decisis and the scholarly debate surrounding its scope and application has not been exhaustive, it should provide a foundation for understanding the importance of this study. As states, political interest groups, legal scholars, and political scientists engage in the debate over the preference of elected or appointed state supreme court justices, the effect that reform decisions will have on a state's legal system will go beyond simple election reform. For just as judicial activism and judicial restraint are at the core of the politics of judicial selection, the principle of stare decisis is at the core of our system of jurisprudence. Therefore, it is valuable to the elected-appointed discussion to understand the effects, if any, that judicial selection methods have on the application of the doctrine of stare decisis.

## II. METHODS USED TO SELECT STATE HIGH COURT JUDGES<sup>28</sup>

An overview of the various selection systems used in the fifty states quickly reveals that nearly every state has its own unique system. However, categorizing the state systems into groups and subgroups is possible and beneficial for the purposes of this study.

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<sup>25</sup> *Id.* at 468 (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-11 (1932) (Brandeis, J., dissenting)).

<sup>26</sup> 163 U.S. 537 (1896) (case that established "separate but equal" doctrine for the education of blacks, which was overruled by *Brown v. Board of Education*, 349 U.S. 294 (1954)).

<sup>27</sup> 198 U.S. 45 (1905) (case that established economic substantive due process, which was essentially overruled by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937)).

<sup>28</sup> The information in this section was collected from *Judicial Selection Methods in the States*, American Judicature Society, at <http://www.ajs.org/select11.html> (visited Dec. 14, 2000). See also LARRY BERKSON, SCOTT BELLER, & MICHELE GRIMALDI, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* (1981); MARVIN COMISKY & PHILIP C. PATTERSON, *THE JUDICIARY – SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE* (1987).



There are generally two basic systems used by the states: appointment and election. Most of the states that use an appointment system utilize a merit commission selection system, but gubernatorial and legislative appointment are used by a few states. The balance of the states employ a system where the voters initially elect their high court judges, either in a partisan or non-partisan manner.

A. Appointed

1. *Merit Selection Through a Nominating Commission*

After a nearly a one-hundred year period where many states adopted a judicial selection system of electing judges,<sup>29</sup> the most common current process of choosing judges by the states is a version of the merit plan outlined by the American Bar Association (ABA) in 1937.<sup>30</sup> Today, twenty-four of the fifty states follow some form of the merit plan process.

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<sup>29</sup> All the new states who joined the United States before 1845 adopted a system of either by (1) election by the legislature, or (2) appointment by the governor with confirmation by the legislature. See PHILIP L. DUBOIS, *FROM BALLOT TO BENCH* 3 (1980). Rooted in populist thought and a disenchantment with the fact that property owners controlled the judiciary though, dissatisfaction with these systems had begun to develop in the 1820s, and in 1832, Mississippi adopted a system of electing their judges. See *id.*; see also BERKSON, *supra* note 27, at 3. The states began to abandon their judicial selection systems for direct elections and every new state that joined the Union between 1846 and 1912 provided for an elective judiciary. See DUBOIS, *supra* at 3. Resentment by the legal profession towards political party leaders had developed by the beginning of the twentieth century, and many states sought ways to minimize political and party control over the selection process. See *id.* at 4. Judicial selection reform efforts followed. See *id.*

<sup>30</sup> The merit plan suggested that the best plan for choosing judges was:

- (a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for that purpose, who will hold no other public office.
- (b) If further check on appointments is desired, such check may be supplied by the requirement of confirmation by the State Senate or other legislative body of appointments made through the dual agency suggested.
- (c) The appointee after a period of service should be eligible for reappointment periodically thereafter, or periodically go before the people upon his record, with no opposing candidate, the people voting upon the question "Shall Judge Blank be retained in office?"

CHARLES H. SHELDON & LINDA S. MAULE, *CHOOSING JUSTICE* 127 (1997).



There are certainly variations on the ABA plan that have been adopted, but generally under the merit plan, a non-partisan commission comprised of lawyers and non-lawyers provides a list of candidates to the state's governor. Of this list, which typically includes between three to five candidates depending on the state, the governor chooses an individual to fill the vacancy.<sup>31</sup>

Following this initial appointment by a merit selection commission, most states call for a retention election by the people, after the justice has served a term of years on the bench. However, some state systems have unique post-appointment processes, such as requiring reappointment by the commission, re-nomination by the governor, holding the seat until the justice reaches the age of seventy, or even holding it for life. Table 1 charts the methods used by these twenty-four merit selection states.

**Table 1. States With Merit Selection Through a Nominating Commission**

STATE	INITIAL TERM OF OFFICE	METHOD OF RETENTION
Alaska	3 years	Retention election (10 year term)
Arizona	2 years	Retention election (6 year term)
Colorado	2 years	Retention election (10 year term)
Connecticut	8 years	Commission reviews incumbent's performance; Governor renominates and legislature confirms
Delaware	12 years	Incumbent reapplies to the nominating commission and competes with other applicants for nomination to the governor; Governor may then reappoint the incumbent or another nominee; Senate confirms
Florida	1 year	Retention election (6 year term)
Hawaii	10 years	Reappointment by the

<sup>31</sup> JOANNE MARTIN, MERIT SELECTION COMMISSIONS: WHAT DO THEY DO? HOW EFFECTIVE ARE THEY? (American Bar Association 1993).

		commission (10 year term)
Indiana	2 years	Retention election (10 year term)
Iowa	1 year	Retention election (8 year term)
Kansas	1 year	Retention election (6 year term)
Maryland	Until first election after one year has expired since the vacancy	Retention election (10 year term)
Massachusetts	To age 70	
Missouri	1 year	Retention election (12 year term)
Nebraska	3 years	Retention election (6 year term)
New Hampshire	To age 70	
New Mexico	Until next general election	Retention election (8 year term)
New York	14 years	Incumbent reapplies to the nominating commission and competes with other applicants for nomination to the governor; Governor may then reappoint the incumbent or another nominee; Senate confirms
Oklahoma	1 year	Retention election (6 year term)
Rhode Island	Life	
South Dakota	3 years	Retention election (8 year term)
Tennessee	Until next biennial general election	Retention election (8 year term)
Utah	Until first general election more than 3 years after the appointment	Retention election (10 year term)
Vermont	6 years	Retention vote of the General Assembly (6 years)
Wyoming	1 year	Retention election (8 year term)

## 2. *Gubernatorial Appointment Without a Nominating Committee*

Several states use a system where the governor appoints justices to the state's highest court, without a nominating commission making recommendations to the governor. Three states – California, Maine and New Jersey – use this method, but the reappointment/retention is handled differently among them. Table 2 charts the methods used by these gubernatorial appointment states.

**Table 2. States with Gubernatorial Appointment Without a Nominating Commission**

STATE	INITIAL TERM OF OFFICE	METHOD OF RETENTION
California	12 years	Retention election (12 years)
Maine	7 years	Reappointment by governor; subject to legislative confirmation
New Jersey	7 years	Reappointment by governor (to age 70) with consent of the Senate

### 3. *Legislative Appointment*

The State of Virginia provides for legislative appointment without a nominating commission making a recommendation to the legislature, the only such system among the fifty states.

**Table 3. Legislative Appointment Without Nominating Commission (Virginia)**

STATE	INITIAL TERM OF OFFICE	METHOD OF RETENTION
Virginia	12 years	Reappointment by the legislature

The State of South Carolina provides for legislative appointment with a nominating commission recommending three individuals to the General Assembly for selection. The General Assembly then elects a justice by a majority vote of the joint session.

**Table 4. Legislative Appointment With Nominating Commission (South Carolina)**

STATE	INITIAL TERM OF OFFICE	METHOD OF RETENTION
South Carolina	10 years	Reappointment by legislature

B. Elected

The remaining twenty states provide that the people directly elect their judges, at least to the state's highest court. While twelve of these states hold non-partisan elections, the other eight hold partisan elections. Table 5 outlines the specifics of each of the states that elect their high court judges:

**Table 5. States With Initial Selection By Election**

STATE	AFFILIATED	INITIAL TERM OF OFFICE	METHOD OF RETENTION
Alabama	Partisan	6 years	Re-election (6 years)
Arkansas	Partisan	8 years	Re-election (8 years)
Georgia	Non-Partisan	6 years	Re-election (6 years)
Idaho	Non-Partisan	6 years	Re-election (6 years)
Illinois	Partisan	10 years	Retention election (10 years)
Kentucky	Non-Partisan	8 years	Re-election (8 years)
Louisiana	Partisan	10 years	Re-election (10 years)
Michigan	Non-Partisan	8 years	Re-election (8 years)
Minnesota	Non-Partisan	6 years	Re-election (6 years)
Mississippi	Non-Partisan	8 years	Re-election (8 years)
Montana	Non-Partisan	8 years	Re-election (8 years)
Nevada	Non-Partisan	6 years	Re-election (6 years)
North Carolina	Partisan	8 years	Re-election (8 years)
North Dakota	Non-Partisan	10 years	Re-election (10 years)
Ohio	Non-Partisan	6 years	Re-election (6 years)
Oregon	Non-Partisan	6 years	Re-election (6 years)
Pennsylvania	Partisan	10 years	Retention election (10 years)
Texas	Partisan	6 years	Re-election (6 years)
Washington	Non-Partisan	6 years	Re-election (6 years)
West Virginia	Partisan	12 years	Re-election (12 years)
Wisconsin	Non-Partisan	10 years	Re-election (10 years)

### III. THE METHODOLOGY

#### A. Hypothesis

The cardinal hypothesis tested by this study is:

- (A) The method of initial judicial selection does not significantly affect the volatility of state high courts.

The sub-hypotheses tested by this study are:

- (1) The method of initial judicial selection does not significantly affect the types of overruling cases.
- (2) The method of initial judicial selection does not significantly affect the age of overruled cases.

#### B. The Model

This study compares the volatility of state supreme courts in states that initially elect and states that initially appoint their high court members, by measuring adherence to stare decisis among these states.

##### 1. *States Compared*

This study examines the decisions of the twenty-four states that utilize merit selection through a nominating commission,<sup>32</sup> and the states that initially select high court members by popular election.<sup>33</sup> The study compares these two forms of judicial selection.

In order to amply analyze states from both of the judicial election categories, data from a sample of states from each method is collected. For states that initially elect their state high court justices, caseloads from Illinois, Michigan, Minnesota, North Dakota,

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<sup>32</sup> See *infra* Table 1.

<sup>33</sup> See *infra* Table 5.

Ohio, and Wisconsin are surveyed. For states that initially appoint, Indiana, Iowa, Massachusetts, Nebraska, New York, and South Dakota opinions are analyzed.

## *2. Data To Be Analyzed*

This study analyzes the entire set of state supreme court opinions for each state selected for the years 1994 to 1999. Any written opinion that is issued by one of these state high courts will be included in the data, regardless of the topical area of law.

## *3. Process Used To Collect Data*

Opinion data was collected by manually examining Shepard's Citations paper copies of the Northwestern Reporter and the Northeastern Reporter.<sup>34</sup> Each page of the supplements containing the years 1995-1999 were individually surveyed for cases that had been "overruled." The citations listed in the supplement for the overruled cases and the pinpoint citations for the overruling cases were then noted.

Each case, both overruled and overruling, was then manually verified by examination of the actual Northwestern, Northwestern Second, Northeastern, or Northeastern Second Reporters containing it. The following additional information was then collected for each case: reporter citation, year, court, and type of case (criminal or civil).

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<sup>34</sup> SHEPARD'S NORTHWESTERN REPORTER CITATIONS (Supp. 1993-1996); SHEPARD'S NORTHWESTERN REPORTER CITATIONS (Supp. 1997-1999); SHEPARD'S NORTHWESTERN REPORTER CITATIONS (Supp. 1997-1999); SHEPARD'S NORTHWESTERN REPORTER CITATIONS (Supp. Nov. 2000); SHEPARD'S NORTHEASTERN



C. Factors Considered in Designing the Study

1. *Actual Judicial Selection Includes Informal Forces*

To suggest that the selection of judges is simply dictated by the official selection process used by a particular state would be shortsighted. While some studies have been done on the effect of recruitment methods on the judiciary, such studies have focused on the formal methods used.<sup>35</sup> It is the informal practices that are difficult to factor into research, yet “shape significantly the outcome of the formal selection methods.”<sup>36</sup> For example, while a merit commission system may present a particular governor with three choices for a vacancy, that governor may choose the nominee that is the least innovative or even the most likely to apply the principle of stare decisis. Such informal factors make it more difficult to fully analyze the effects of different judicial selection methods. Governors, merit selection committees, and electors all use “multiple criteria arising from complex political, legal, and judicial constraints to appoint high-court members.”<sup>37</sup>

For this study, in order to minimize the role of case-by-case informal factors, a mass set of data will be analyzed. Thus, any effect that a particular informal factor may have will be more likely to be balanced by adverse informal factors in the end. For instance, the selections of a pro-precedent governor would more likely be balanced in a study of twelve states than in a study of two states.

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REPORTER CITATIONS (Supp. 1995-1999); SHEPARD'S NORTHEASTERN REPORTER CITATIONS (Supp. Nov. 2000).

<sup>35</sup> See SHELDON, *supra* note 30, at 22.

<sup>36</sup> *Id.* at 23.

## 2. *Judicial Selection Processes Are Not Simply Categorized*

As Tables 1-5 reflect, there are many variations on how states select and retain state supreme court justices.<sup>38</sup> There are variations in the length of the initial term, ranging from as little as the next general election to life. There are variations in the method of retention and the length of the retention term. And of course, there are hybrid judicial selection methods themselves, as indicated in Tables 2-4.

Therefore, it must be recognized that the *initial selection method* that is the focus of this survey is not the only variable. The length of the term could have an effect on judicial decision-making, as could the prospects associated with the method of retention, specifically for those that are elected or appointed after their initial election or appointment. This survey examines only the effects that difference among initial selection methods on adherence to precedent.

## 3. *Vacancies Can Throw A Monkey Wrench*

While the survey model is able to satisfactorily separate forty-four of the states into two categories of judicial selection method, the handling of vacancies on a state supreme court can be inconsistent with the normal process for initial selection. For instance, in Michigan, although justices must seek office through election by popular vote, vacancies on the Michigan Supreme Court are temporarily filled by gubernatorial appointment.<sup>39</sup> In particular situations, the effect of a vacancy or multiple vacancies could have a substantial effect on a state supreme court's ideology.

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<sup>37</sup> PINELLO, *supra* note 2, at 22.

<sup>38</sup> See *supra* Part II.

#### 4. *Court Opinions Are Not Statistical; Court Opinions Are Complex*

"[C]ourt opinions are not discrete quanta of data like, say, election returns. Rather, at a minimum, cases must be read or otherwise analyzed to ascertain contents."<sup>40</sup> Many considerations are made by state supreme courts and individual justices when evaluating a decision whether even to grant leave to hear a case, much less authoring an opinion. In addition, some opinions may effectively overrule some precedent, yet that precedent may not even be recognized in the opinion or even by the court in rendering the opinion. Such data is difficult to track.

However, by utilizing the Shepard's records, this survey is able to most accurately identify cases in which the ruling state supreme court has *intended* to overrule precedent. Shepard's classifies a case as "overruled," the notation being quantified and analyzed by this study, when the overruling court has expressly overruled or disapproved all or part of a case.<sup>41</sup> As a result, this study is able to aptly identify cases that were intended to be overruled by the state supreme courts being surveyed, but is unable to practically quantify the cases that are overruled without intention or express notice by the court.

#### IV. DATA

Table 6 presents the list of overruled and overruling cases collected in this study, and includes the citation, year, court, and type for each case.

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<sup>39</sup> See MICH. CONST. art. VI, § 23. In Michigan, the governor appoints a replacement and the replacement fills the seat until the next general election, where the replacement must be elected by popular vote to fill the remainder of the term of the justice who has been replaced. *Id.*

<sup>40</sup> PINELLO, *supra* note 2, at 23.

**Table 6. Data on Overruled Cases and Overruling Cases, 1995-1999**

Vol.	Rep.	Page	Year	Vol.	Rep.	Page	Pinpoint	Court	Year	Type
1	NE	340	1884	686	NE2d	563	570	Illinois	1997	Civil
67	NE	742	1903	687	NE2d	1050	1061	Illinois	1997	Civil
84	NE2d	435	1949	657	NE2d	988	992	Illinois	1995	Civil
133	NE2d	288	1956	676	NE2d	621	621	Illinois	1997	Civil
442	NE2d	841	1982	702	NE2d	545	552	Illinois	1998	Civil
466	NE2d	195	1984	682	NE2d	45	50	Illinois	1997	Civil
507	NE2d	494	1987	671	NE2d	39	47	Illinois	1996	Civil
507	NE2d	830	1987	701	NE2d	1063	1072	Illinois	1998	Criminal
561	NE2d	576	1990	688	NE2d	635	641	Illinois	1997	Criminal
607	NE2d	217	1992	661	NE2d	329	341	Illinois	1996	Criminal
605	NE2d	525	1992	662	NE2d	415	421	Illinois	1996	Criminal
605	NE2d	525	1992	714	NE2d	501	506	Illinois	1999	Criminal
662	NE2d	1304	1996	701	NE2d	1063	1072	Illinois	1998	Criminal
670	NE2d	679	1996	701	NE2d	1063	1072	Illinois	1998	Criminal
685	NE2d	908	1997	701	NE2d	1063	1072	Illinois	1998	Criminal
154	NE2d	109	1958	688	NE2d	1243	1245	Indiana	1997	Civil
258	NE2d	628	1970	690	NE2d	162	167	Indiana	1997	Criminal
292	NE2d	790	1973	689	NE2d	1238	1246	Indiana	1997	Criminal
356	NE2d	1188	1976	689	NE2d	1238	1246	Indiana	1997	Criminal
429	NE2d	956	1982	690	NE2d	1098	1108	Indiana	1997	Criminal
430	NE2d	1150	1982	696	NE2d	865	869	Indiana	1998	Criminal
450	NE2d	1005	1983	658	NE2d	563	570	Indiana	1995	Criminal
456	NE2d	386	1983	658	NE2d	563	570	Indiana	1995	Criminal
449	NE2d	1060	1983	698	NE2d	732	735	Indiana	1998	Criminal
448	NE2d	1057	1983	702	NE2d	1026	1027	Indiana	1998	Civil
463	NE2d	228	1984	658	NE2d	563	570	Indiana	1995	Criminal
465	NE2d	711	1984	658	NE2d	563	570	Indiana	1995	Criminal
466	NE2d	456	1984	658	NE2d	563	570	Indiana	1995	Criminal
466	NE2d	421	1984	709	NE2d	326	329	Indiana	1999	Criminal
472	NE2d	1247	1985	717	NE2d	32	49	Indiana	1999	Criminal
479	NE2d	1319	1985	717	NE2d	32	49	Indiana	1999	Criminal
481	NE2d	100	1985	717	NE2d	32	49	Indiana	1999	Criminal
485	NE2d	879	1985	717	NE2d	32	49	Indiana	1999	Criminal
489	NE2d	49	1986	658	NE2d	563	570	Indiana	1995	Criminal
490	NE2d	260	1986	658	NE2d	563	570	Indiana	1995	Criminal
490	NE2d	1083	1986	717	NE2d	32	49	Indiana	1999	Criminal
515	NE2d	1388	1987	658	NE2d	563	570	Indiana	1995	Criminal
513	NE2d	650	1987	689	NE2d	1238	1246	Indiana	1997	Criminal
517	NE2d	788	1988	658	NE2d	563	570	Indiana	1995	Criminal
519	NE2d	546	1988	658	NE2d	563	570	Indiana	1995	Criminal

<sup>41</sup> See SHEPARD'S NORTHWESTERN REPORTER CITATIONS (Supp. 1997-1999).

528	NE2d	1119	1988	658	NE2d	563	570	Indiana	1995	Criminal
529	NE2d	343	1988	658	NE2d	563	570	Indiana	1995	Criminal
526	NE2d	963	1988	674	NE2d	968	971	Indiana	1996	Criminal
522	NE2d	371	1988	704	NE2d	1020	1021	Indiana	1998	Civil
517	NE2d	383	1988	717	NE2d	32	49	Indiana	1999	Criminal
518	NE2d	479	1988	717	NE2d	32	49	Indiana	1999	Criminal
523	NE2d	750	1988	717	NE2d	32	49	Indiana	1999	Criminal
528	NE2d	60	1988	717	NE2d	32	49	Indiana	1999	Criminal
539	NE2d	473	1989	658	NE2d	563	570	Indiana	1995	Criminal
536	NE2d	263	1989	698	NE2d	732	736	Indiana	1998	Criminal
547	NE2d	772	1989	717	NE2d	32	49	Indiana	1999	Criminal
552	NE2d	477	1990	709	NE2d	326	329	Indiana	1999	Criminal
567	NE2d	1149	1991	658	NE2d	563	570	Indiana	1995	Criminal
581	NE2d	1228	1991	689	NE2d	1238	1246	Indiana	1997	Criminal
583	NE2d	1202	1992	709	NE2d	326	329	Indiana	1999	Criminal
591	NE2d	1019	1992	717	NE2d	32	49	Indiana	1999	Criminal
595	NE2d	242	1992	717	NE2d	32	49	Indiana	1999	Criminal
617	NE2d	912	1993	690	NE2d	1098	1109	Indiana	1997	Criminal
622	NE2d	495	1993	717	NE2d	32	49	Indiana	1999	Criminal
634	NE2d	1334	1994	685	NE2d	1062	1063	Indiana	1997	Criminal
628	NE2d	1212	1994	717	NE2d	32	49	Indiana	1999	Criminal
633	NE2d	250	1994	717	NE2d	32	49	Indiana	1999	Criminal
644	NE2d	104	1994	717	NE2d	32	49	Indiana	1999	Criminal
659	NE2d	122	1995	717	NE2d	32	49	Indiana	1999	Criminal
685	NE2d	1062	1997	721	NE2d	220	223	Indiana	1999	Criminal
105	NW	110	1905	585	NW2d	273	276	Iowa	1998	Civil
151	NW	835	1915	557	NW2d	871	879	Iowa	1996	Criminal
284	NW	113	1939	557	NW2d	871	878	Iowa	1996	Criminal
32	NW2d	798	1948	545	NW2d	526	529	Iowa	1996	Civil
125	NW2d	242	1963	562	NW2d	633	636	Iowa	1997	Criminal
195	NW2d	118	1972	574	NW2d	280	284	Iowa	1998	Criminal
203	NW2d	116	1972	578	NW2d	655	659	Iowa	1998	Criminal
215	NW2d	350	1974	578	NW2d	681	685	Iowa	1998	Civil
223	NW2d	263	1974	578	NW2d	681	685	Iowa	1998	Civil
240	NW2d	431	1976	578	NW2d	681	685	Iowa	1998	Civil
275	NW2d	736	1979	579	NW2d	317	321	Iowa	1998	Criminal
312	NW2d	530	1981	540	NW2d	254	260	Iowa	1995	Civil
310	NW2d	197	1981	557	NW2d	871	879	Iowa	1996	Criminal
337	NW2d	495	1983	540	NW2d	254	260	Iowa	1995	Civil
334	NW2d	295	1983	543	NW2d	614	617	Iowa	1996	Civil
353	NW2d	428	1984	544	NW2d	433	440	Iowa	1996	Criminal
402	NW2d	765	1987	577	NW2d	845	848	Iowa	1998	Civil
441	NW2d	347	1989	577	NW2d	845	848	Iowa	1998	Civil
440	NW2d	884	1989	585	NW2d	217	224	Iowa	1998	Civil
469	NW2d	689	1991	548	NW2d	558	562	Iowa	1996	Civil



467	NW2d	578	1991	557	NW2d	871	879	Iowa	1996	Criminal
468	NW2d	462	1991	600	NW2d	598	601	Iowa	1999	Criminal
490	NW2d	838	1992	539	NW2d	160	165	Iowa	1995	Criminal
488	NW2d	436	1992	543	NW2d	614	617	Iowa	1996	Civil
503	NW2d	591	1993	557	NW2d	871	879	Iowa	1996	Criminal
500	NW2d	70	1993	594	NW2d	22	29	Iowa	1999	Civil
515	NW2d	10	1994	541	NW2d	864	869	Iowa	1995	Criminal
581	NW2d	616	1998	594	NW2d	22	29	Iowa	1999	Civil
8	NE2d	919	1937	690	NE2d	1231	1231	Mass.	1998	Civil
647	NE2d	712	1995	701	NE2d	314	318	Mass.	1998	Criminal
56	NW	605	1893	545	NW2d	351	357	Michigan	1996	Civil
8	NW2d	161	1943	577	NW2d	79	86	Michigan	1998	Civil
35	NW2d	376	1949	597	NW2d	130	140	Michigan	1999	Criminal
45	NW2d	26	1950	579	NW2d	859	859	Michigan	1998	Civil
69	NW2d	140	1955	597	NW2d	130	140	Michigan	1999	Criminal
130	NW2d	4	1964	597	NW2d	148	155	Michigan	1999	Civil
148	NW2d	784	1967	597	NW2d	130	140	Michigan	1999	Criminal
189	NW2d	202	1971	597	NW2d	148	155	Michigan	1999	Civil
207	NW2d	316	1973	597	NW2d	28	33	Michigan	1999	Civil
217	NW2d	22	1974	597	NW2d	148	155	Michigan	1999	Civil
227	NW2d	535	1975	581	NW2d	229	232	Michigan	1998	Criminal
247	NW2d	866	1976	551	NW2d	389	390	Michigan	1996	Criminal
257	NW2d	522	1977	565	NW2d	650	657	Michigan	1997	Civil
269	NW2d	143	1978	575	NW2d	762	764	Michigan	1998	Civil
269	NW2d	153	1978	575	NW2d	762	764	Michigan	1998	Civil
265	NW2d	163	1978	597	NW2d	148	155	Michigan	1999	Civil
301	NW2d	809	1981	577	NW2d	466	471	Michigan	1998	Criminal
355	NW2d	98	1984	538	NW2d	351	354	Michigan	1995	Criminal
398	NW2d	411	1986	596	NW2d	915	916	Michigan	1999	Civil
407	NW2d	355	1987	580	NW2d	424	428	Michigan	1998	Civil
454	NW2d	73	1990	543	NW2d	923	926	Michigan	1996	Civil
468	NW2d	498	1991	597	NW2d	28	33	Michigan	1999	Civil
489	NW2d	422	1992	595	NW2d	832	839	Michigan	1999	Civil
511	NW2d	654	1993	576	NW2d	129	129	Michigan	1998	Criminal
527	NW2d	760	1994	595	NW2d	832	839	Michigan	1999	Civil
524	NW2d	217	1994	597	NW2d	130	139	Michigan	1999	Criminal
538	NW2d	380	1995	594	NW2d	487	489	Michigan	1999	Criminal
531	NW2d	168	1995	595	NW2d	832	839	Michigan	1999	Civil
568	NW2d	81	1997	594	NW2d	477	482	Michigan	1999	Criminal
568	NW2d	510	1997	597	NW2d	28	33	Michigan	1999	Civil
572	NW2d	191	1998	594	NW2d	447	452	Michigan	1999	Civil
577	NW2d	422	1998	596	NW2d	607	612	Michigan	1999	Criminal
578	NW2d	282	1998	602	NW2d	367	370	Michigan	1999	Civil
159	NW2d	895	1968	589	NW2d	793	798	Minnesota	1999	Criminal
243	NW2d	102	1975	533	NW2d	402	404	Minnesota	1995	Civil



278	NW2d	49	1979	551	NW2d	923	927	Minnesota	1996	Civil
302	NW2d	643	1981	544	NW2d	774	776	Minnesota	1996	Criminal
445	NW2d	824	1989	551	NW2d	923	927	Minnesota	1996	Civil
451	NW2d	65	1990	582	NW2d	904	906	Minnesota	1998	Civil
508	NW2d	217	1993	555	NW2d	277	282	Minnesota	1996	Civil
29	NW	204	1886	547	NW2d	711	714	Nebraska	1996	Civil
78	NW	364	1899	602	NW2d	432	438	Nebraska	1999	Civil
80	NW	910	1899	602	NW2d	432	438	Nebraska	1999	Civil
90	NW	912	1902	576	NW2d	817	824	Nebraska	1998	Civil
93	NW	163	1903	550	NW2d	889	896	Nebraska	1996	Civil
98	NW	672	1904	577	NW2d	271	280	Nebraska	1998	Civil
113	NW	236	1907	550	NW2d	889	900	Nebraska	1996	Civil
149	NW	105	1914	537	NW2d	323	329	Nebraska	1995	Criminal
257	NW	244	1934	576	NW2d	817	824	Nebraska	1998	Civil
117	NW2d	778	1962	557	NW2d	657	661	Nebraska	1997	Civil
128	NW2d	766	1964	561	NW2d	230	236	Nebraska	1997	Civil
215	NW2d	895	1974	537	NW2d	323	329	Nebraska	1995	Criminal
219	NW2d	742	1974	565	NW2d	481	484	Nebraska	1997	Criminal
244	NW2d	683	1976	581	NW2d	60	69	Nebraska	1998	Civil
260	NW2d	303	1977	595	NW2d	917	922	Nebraska	1999	Criminal
277	NW2d	572	1979	562	NW2d	351	355	Nebraska	1997	Civil
295	NW2d	112	1980	595	NW2d	917	922	Nebraska	1999	Criminal
313	NW2d	248	1981	545	NW2d	727	736	Nebraska	1996	Civil
336	NW2d	101	1983	587	NW2d	384	389	Nebraska	1998	Criminal
332	NW2d	922	1983	589	NW2d	108	111	Nebraska	1999	Criminal
354	NW2d	134	1984	560	NW2d	462	467	Nebraska	1997	Civil
356	NW2d	877	1984	589	NW2d	108	111	Nebraska	1999	Criminal
355	NW2d	514	1984	595	NW2d	917	926	Nebraska	1999	Criminal
371	NW2d	302	1985	537	NW2d	323	329	Nebraska	1995	Criminal
366	NW2d	429	1985	586	NW2d	591	627	Nebraska	1998	Criminal
378	NW2d	855	1985	602	NW2d	657	663	Nebraska	1999	Civil
387	NW2d	695	1986	595	NW2d	917	926	Nebraska	1999	Criminal
390	NW2d	533	1986	595	NW2d	917	926	Nebraska	1999	Criminal
402	NW2d	867	1987	589	NW2d	108	111	Nebraska	1999	Criminal
398	NW2d	729	1987	595	NW2d	917	926	Nebraska	1999	Criminal
406	NW2d	636	1987	601	NW2d	757	763	Nebraska	1999	Civil
432	NW2d	547	1988	586	NW2d	591	627	Nebraska	1998	Criminal
443	NW2d	249	1989	566	NW2d	392	395	Nebraska	1997	Civil
439	NW2d	486	1989	580	NW2d	523	531	Nebraska	1998	Civil
434	NW2d	546	1989	589	NW2d	108	111	Nebraska	1999	Criminal
449	NW2d	555	1989	589	NW2d	108	111	Nebraska	1999	Criminal
434	NW2d	293	1989	595	NW2d	917	926	Nebraska	1999	Criminal
447	NW2d	243	1989	595	NW2d	259	262	Nebraska	1999	Criminal
437	NW2d	503	1989	598	NW2d	450	463	Nebraska	1999	Criminal
456	NW2d	281	1990	545	NW2d	727	736	Nebraska	1996	Civil

459	NW2d	204	1990	601	NW2d	769	774	Nebraska	1999	Criminal
475	NW2d	105	1991	558	NW2d	35	40	Nebraska	1997	Civil
464	NW2d	769	1991	578	NW2d	413	417	Nebraska	1998	Civil
470	NW2d	780	1991	582	NW2d	350	353	Nebraska	1998	Civil
469	NW2d	542	1991	603	NW2d	411	419	Nebraska	1999	Civil
480	NW2d	700	1992	537	NW2d	323	329	Nebraska	1995	Criminal
485	NW2d	760	1992	589	NW2d	108	111	Nebraska	1999	Criminal
480	NW2d	401	1992	595	NW2d	917	926	Nebraska	1999	Criminal
491	NW2d	324	1992	595	NW2d	917	926	Nebraska	1999	Criminal
504	NW2d	539	1993	571	NW2d	783	787	Nebraska	1998	Civil
497	NW2d	17	1993	589	NW2d	108	110	Nebraska	1999	Criminal
500	NW2d	547	1993	589	NW2d	108	110	Nebraska	1999	Criminal
503	NW2d	822	1993	589	NW2d	108	110	Nebraska	1999	Criminal
524	NW2d	763	1994	571	NW2d	276	293	Nebraska	1997	Criminal
509	NW2d	638	1994	578	NW2d	837	847	Nebraska	1998	Criminal
510	NW2d	58	1994	583	NW2d	31	35	Nebraska	1998	Criminal
515	NW2d	654	1994	583	NW2d	31	35	Nebraska	1998	Criminal
515	NW2d	773	1994	583	NW2d	31	35	Nebraska	1998	Criminal
519	NW2d	507	1994	583	NW2d	31	35	Nebraska	1998	Criminal
519	NW2d	561	1994	583	NW2d	31	35	Nebraska	1998	Criminal
523	NW2d	681	1994	583	NW2d	31	35	Nebraska	1998	Criminal
524	NW2d	58	1994	583	NW2d	31	35	Nebraska	1998	Criminal
524	NW2d	551	1994	583	NW2d	31	35	Nebraska	1998	Criminal
512	NW2d	128	1994	589	NW2d	108	110	Nebraska	1999	Criminal
519	NW2d	507	1994	589	NW2d	108	110	Nebraska	1999	Criminal
510	NW2d	294	1994	600	NW2d	780	786	Nebraska	1999	Civil
514	NW2d	844	1994	601	NW2d	769	774	Nebraska	1999	Criminal
526	NW2d	67	1995	537	NW2d	323	330	Nebraska	1995	Criminal
531	NW2d	222	1995	583	NW2d	31	35	Nebraska	1998	Criminal
531	NW2d	231	1995	583	NW2d	31	35	Nebraska	1998	Criminal
532	NW2d	619	1995	583	NW2d	31	35	Nebraska	1998	Criminal
534	NW2d	572	1995	583	NW2d	31	35	Nebraska	1998	Criminal
541	NW2d	380	1995	595	NW2d	917	926	Nebraska	1999	Criminal
543	NW2d	128	1996	583	NW2d	31	35	Nebraska	1998	Criminal
543	NW2d	462	1996	583	NW2d	31	35	Nebraska	1998	Criminal
543	NW2d	725	1996	583	NW2d	31	35	Nebraska	1998	Criminal
545	NW2d	94	1996	583	NW2d	31	35	Nebraska	1998	Criminal
550	NW2d	347	1996	592	NW2d	148	155	Nebraska	1999	Criminal
556	NW2d	23	1996	601	NW2d	757	763	Nebraska	1999	Civil
560	NW2d	477	1997	571	NW2d	269	273	Nebraska	1997	Civil
571	NW2d	261	1997	601	NW2d	757	763	Nebraska	1999	Civil
560	NW2d	829	1997	603	NW2d	378	378	Nebraska	1999	Criminal
568	NW2d	241	1997	603	NW2d	373	373	Nebraska	1999	Civil
575	NW2d	156	1998	587	NW2d	325	332	Nebraska	1998	Criminal
587	NW2d	665	1998	589	NW2d	108	110	Nebraska	1999	Criminal

573	NW2d	739	1998	601	NW2d	757	763	Nebraska	1999	Civil
20	NE	383	1889	703	NE2d	1214	1214	New York	1998	Civil
161	NE	463	1928	658	NE2d	1041	1042	New York	1995	Criminal
151	NE2d	898	1958	681	NE2d	1287	1289	New York	1997	Civil
192	NE2d	727	1963	657	NE2d	1311	1312	New York	1995	Civil
230	NE2d	394	1967	647	NE2d	736	740	New York	1995	Civil
378	NE2d	1027	1978	647	NE2d	736	740	New York	1995	Civil
387	NE2d	613	1979	647	NE2d	736	740	New York	1995	Civil
268	NW	400	1936	553	NW2d	192	197	North Dakota	1996	Civil
68	NW2d	849	1955	565	NW2d	491	495	North Dakota	1997	Civil
209	NW2d	772	1973	567	NW2d	336	342	North Dakota	1997	Criminal
236	NW2d	910	1975	565	NW2d	491	495	North Dakota	1997	Civil
316	NW2d	93	1982	567	NW2d	336	342	North Dakota	1997	Criminal
478	NW2d	566	1991	534	NW2d	821	824	North Dakota	1995	Criminal
499	NW2d	872	1993	567	NW2d	336	342	North Dakota	1997	Criminal
568	NW2d	284	1997	584	NW2d	84	90	North Dakota	1998	Civil
562	NW2d	565	1997	598	NW2d	147	157	North Dakota	1999	Criminal
147	NE	806	1925	693	NE2d	212	213	Ohio	1998	Civil
52	NE2d	67	1943	653	NE2d	226	230	Ohio	1995	Civil
56	NE2d	214	1944	661	NE2d	1043	1044	Ohio	1996	Criminal
68	NE2d	64	1946	693	NE2d	212	213	Ohio	1998	Civil
174	NE2d	96	1961	702	NE2d	81	89	Ohio	1998	Criminal
253	NE2d	785	1969	651	NE2d	965	974	Ohio	1995	Criminal
254	NE2d	10	1969	653	NE2d	226	230	Ohio	1995	Civil
272	NE2d	97	1971	668	NE2d	480	484	Ohio	1996	Civil
321	NE2d	787	1975	653	NE2d	235	236	Ohio	1995	Civil
372	NE2d	583	1978	667	NE2d	384	388	Ohio	1996	Criminal
398	NE2d	781	1979	667	NE2d	384	388	Ohio	1996	Criminal
466	NE2d	176	1984	661	NE2d	728	736	Ohio	1996	Criminal
476	NE2d	1045	1985	658	NE2d	300	302	Ohio	1996	Criminal
491	NE2d	1114	1986	677	NE2d	308	326	Ohio	1997	Civil
521	NE2d	773	1988	665	NE2d	1123	1123	Ohio	1996	Civil
533	NE2d	775	1988	665	NE2d	1123	1123	Ohio	1996	Civil
521	NE2d	789	1988	668	NE2d	913	917	Ohio	1996	Civil
522	NE2d	464	1988	696	NE2d	1035	1038	Ohio	1998	Civil
530	NE2d	909	1988	711	NE2d	225	228	Ohio	1999	Civil
524	NE2d	502	1988	712	NE2d	747	748	Ohio	1999	Civil
569	NE2d	904	1991	661	NE2d	1049	1052	Ohio	1996	Civil
574	NE2d	457	1991	692	NE2d	581	584	Ohio	1998	Civil
588	NE2d	849	1992	665	NE2d	1123	1123	Ohio	1996	Civil
615	NE2d	1022	1993	690	NE2d	502	503	Ohio	1998	Civil
30	NW2d	9	1947	585	NW2d	819	824	South Dakota	1998	Civil
50	NW2d	641	1951	585	NW2d	819	824	South Dakota	1998	Civil
80	NW2d	74	1956	558	NW2d	347	357	South Dakota	1996	Civil
276	NW2d	259	1979	559	NW2d	891	895	South Dakota	1997	Civil



327	NW2d	120	1982	582	NW2d	688	691	South Dakota	1998	Civil
459	NW2d	415	1990	599	NW2d	384	396	South Dakota	1999	Civil
495	NW2d	305	1993	541	NW2d	725	732	South Dakota	1995	Criminal
527	NW2d	903	1995	567	NW2d	220	220	South Dakota	1997	Civil
259	NW	842	1935	580	NW2d	289	295	Wisconsin	1998	Civil
132	NW2d	493	1965	547	NW2d	592	598	Wisconsin	1996	Civil
152	NW2d	898	1967	526	NW2d	144	151	Wisconsin	1995	Criminal
166	NW2d	129	1969	526	NW2d	144	151	Wisconsin	1995	Criminal
223	NW2d	442	1974	526	NW2d	144	151	Wisconsin	1995	Criminal
240	NW2d	124	1976	573	NW2d	842	851	Wisconsin	1998	Civil
255	NW2d	564	1977	577	NW2d	13	18	Wisconsin	1998	Civil
249	NW2d	524	1977	579	NW2d	654	660	Wisconsin	1998	Criminal
260	NW2d	700	1978	577	NW2d	13	18	Wisconsin	1998	Civil
292	NW2d	601	1980	564	NW2d	716	721	Wisconsin	1997	Criminal
347	NW2d	595	1984	547	NW2d	592	598	Wisconsin	1996	Civil
394	NW2d	732	1986	546	NW2d	460	463	Wisconsin	1996	Civil
401	NW2d	578	1987	533	NW2d	464	466	Wisconsin	1995	Civil
436	NW2d	594	1989	532	NW2d	729	731	Wisconsin	1995	Civil
471	NW2d	202	1991	533	NW2d	419	434	Wisconsin	1995	Civil
497	NW2d	723	1993	528	NW2d	430	431	Wisconsin	1995	Criminal
501	NW2d	9	1993	557	NW2d	245	250	Wisconsin	1996	Criminal
509	NW2d	285	1994	575	NW2d	266	267	Wisconsin	1998	Civil

#### IV. STATISTICAL ANALYSIS OF THE RESULTS

##### A. Descriptive Compilation

##### 1. *Number of Overruling Cases*

Broken out by state and year, Table 7 displays the number of state supreme court decisions that overruled at least one prior state supreme court decision.<sup>42</sup> Over the five year survey period, the six states that initially elect their high court justices released 79 overturning opinions for an average of 13.2 per state. The six states that initially appoint issued 86 overturning opinions during the survey period, for an average of 14.3 per state.

<sup>42</sup> Some overruling cases in the survey overruled multiple prior state supreme court cases. Because in most cases, the overruling cases simply overruled a string of prior cases that applied the original precedent, and since it is likely a matter of personal writing preference as to whether all prior cases applying the law being overturned, this survey counts overturning cases not overturned cases.

**Table 7. Data on Amount of State Supreme Court Decisions Overruling Prior State Supreme Court Decisions of the Same State, 1995-1999**

	Selection Method	1995	1996	1997	1998	1999	TOTAL
Illinois	Election	1	3	5	2	1	12
Indiana	Appointment	1	1	5	4	3	14
Iowa	Appointment	3	5	1	7	2	18
Massachusetts	Appointment	0	0	0	2	0	2
Michigan	Election	1	3	1	7	9	21
Minnesota	Election	1	4	0	1	1	7
Nebraska	Appointment	2	3	9	12	14	40
New York	Appointment	3	0	1	1	0	5
North Dakota	Election	1	1	2	1	1	6
Ohio	Election	3	8	1	5	2	19
South Dakota	Appointment	1	1	2	2	1	7
Wisconsin	Election	5	3	1	5	0	14

2. *Type of Case: Criminal or Civil?*

The survey tracks the type of case, either civil or criminal nature, of each of the overturning cases included in the resulting data set. As Table 8 reflects, analyzing the ratio of criminal to civil in the survey, states that initially appoint overturned precedent in criminal cases at a higher rate than states that initially elect their state supreme court justices. Of the overturning cases in electing states, 38.5% were criminal, while in appointing states 45.3% were criminal.

**Table 8. Breakdown of Type of Cases Overruling Prior State Supreme Court Precedent, 1995-1999**

	Method of Selection			Total Cases	% of Cases	
		Criminal	Civil		Criminal	Civil
Illinois	Election	5	7	12	41.7%	58.3%
Indiana	Appointment	11	3	14	78.6%	21.4%
Iowa	Appointment	9	9	18	50.0%	50.0%
Massachusetts	Appointment	1	1	2	50.0%	50.0%
Michigan	Election	9	12	21	42.9%	57.1%
Minnesota	Election	2	4	6	33.3%	66.7%

Nebraska	Appointment	16	24	40	40.0%	60.0%
New York	Appointment	1	4	5	20.0%	80.0%
North Dakota	Election	3	3	6	50.0%	50.0%
Ohio	Election	6	13	19	31.6%	68.4%
South Dakota	Appointment	1	6	7	14.3%	85.7%
Wisconsin	Election	5	9	14	35.7%	64.3%
	Total Elected	30	48	78	38.5%	61.5%
	Total Apptd	39	47	86	45.3%	54.7%

### 3. *Age of the Overruled Precedent*

In order to gauge any irregularities in the age of the cases being overruled, the study tracked the year of decision for each of the cases overruled. As Table 9 shows, overruled opinions from states that initially elect had an average age of 1976, while overruled opinions from initially appointed states had an average age of 1978.

**Table 9. Average Age of Overturned State Supreme Court Precedent, 1995-1999**

	Selection Method	Average Age
Illinois	Election	1972
Indiana	Appointment	1987
Iowa	Appointment	1968
Massachusetts	Appointment	1966
Michigan	Election	1975
Minnesota	Election	1977
Nebraska	Appointment	1981
New York	Appointment	1952
North Dakota	Election	1979
Ohio	Election	1975
South Dakota	Appointment	1966
Wisconsin	Election	1979
	Elected Avg. of All Cases	1976
	Appointed Avg. of All Cases	1978



## B. Inferential Analysis

1. *Are States That Initially Elect Their Supreme Court Justices More Likely to Overrule Prior State Supreme Court Precedent Than States That Initially Appoint Their Supreme Court Justices?*

Inferences can be made from two statistical samples that are independently related.<sup>43</sup> For the primary scientific claim that we are testing by this survey, that the means of the number of overturning cases for the populations of initially appointed states ( $\mu_1$ ) and initially elected states ( $\mu_2$ ) are equal, the following are the null hypothesis ( $H_0$ ) and alternative hypothesis ( $H_1$ )<sup>44</sup> tested:

$$H_0: \mu_1 = \mu_2$$

$$H_1: \mu_1 \neq \mu_2$$

Before commencing the testing of the hypothesis  $H_0$ , several variables must first be calculated from the survey data: the number of values in the samples ( $n_1$  and  $n_2$ ), the mean of the samples ( $\bar{x}_1$  and  $\bar{x}_2$ ), and the standard deviation of the samples ( $s_1$  and  $s_2$ ).<sup>45</sup> Table 10 provides the necessary tabulations required for the calculation of these variables for the states that initially appoint ( $n_1$ ,  $\bar{x}_1$ , and  $s_1$ ).

**Table 10. Variable Calculations for States That Initially Appoint**

	Year	Cases Overruled (x)	(x- $\bar{x}_1$ )	(x- $\bar{x}_1$ ) <sup>2</sup>
Indiana	1995	1	-1.87	3.48
	1996	1	-1.87	3.48
	1997	5	2.13	4.55
	1998	4	1.13	1.28
	1999	3	0.13	0.02
Iowa	1995	3	0.13	0.02

<sup>43</sup> See MARIO F. TRIOLA, STATISTICS 437-45 (1995).

<sup>44</sup> See *id.* at 341.

<sup>45</sup> See *id.* at 437-45.

	1996	5	2.13	4.55
	1997	1	-1.87	3.48
	1998	7	4.13	17.08
	1999	2	-0.87	0.75
Mass.	1995	0	-2.87	8.22
	1996	0	-2.87	8.22
	1997	0	-2.87	8.22
	1998	2	-0.87	0.75
	1999	0	-2.87	8.22
Nebraska	1995	2	-0.87	0.75
	1996	3	0.13	0.02
	1997	9	6.13	37.62
	1998	12	9.13	83.42
	1999	14	11.13	123.95
New York	1995	3	0.13	0.02
	1996	0	-2.87	8.22
	1997	1	-1.87	3.48
	1998	1	-1.87	3.48
	1999	0	-2.87	8.22
South Dakota	1995	1	-1.87	3.48
	1996	1	-1.87	3.48
	1997	2	-0.87	0.75
	1998	2	-0.87	0.75
	1999	1	-1.87	3.48
	Mean ( $x_1$ )	2.87	Sum	353.47
	Number of Values ( $n_1$ )	30		

While the mean ( $x_1$ ) is 2.87 and the number of values in the sample ( $n_1$ ) is 30 as indicated in Table 10, the standard deviation requires further computation.

$$s_1 = \sqrt{\frac{\sum (x - x_1)^2}{n_1 - 1}}$$

$$s_1 = \sqrt{\frac{353.47}{30 - 1}}$$

$$s_1 = 3.49$$

Thus, the standard deviation for the sample for states that initially appoint their justices ( $s_1$ ) is 3.49.

Table 11 provides the necessary tabulations required for the calculation of these variables for the states that initially elect their justices ( $n_2$ ,  $x_2$ , and  $s_2$ ).

**Table 11. Variable Calculations for States That Initially Elect**

	Year	Cases Overruled (x)	(x-x <sub>2</sub> )	(x-x <sub>2</sub> ) <sup>2</sup>
Illinois	1995	1	-1.63	2.67
	1996	3	0.37	0.13
	1997	5	2.37	5.60
	1998	2	-0.63	0.40
	1999	1	-1.63	2.67
Michigan	1995	1	-1.63	2.67
	1996	3	0.37	0.13
	1997	1	-1.63	2.67
	1998	7	4.37	19.07
	1999	9	6.37	40.53
Minnesota	1995	1	-1.63	2.67
	1996	4	1.37	1.87
	1997	0	-2.63	6.93
	1998	1	-1.63	2.67
	1999	1	-1.63	2.67
North Dakota	1995	1	-1.63	2.67
	1996	1	-1.63	2.67
	1997	2	-0.63	0.40
	1998	1	-1.63	2.67
	1999	1	-1.63	2.67
Ohio	1995	3	0.37	0.13

	1996	8	5.37	28.80
	1997	1	-1.63	2.67
	1998	5	2.37	5.60
	1999	2	-0.63	0.40
Wisconsin	1995	5	2.37	5.60
	1996	3	0.37	0.13
	1997	1	-1.63	2.67
	1998	5	2.37	5.60
	1999	0	-2.63	6.93
	Mean ( $x_2$ )	2.63	Sum	162.97
	Number of Values ( $n_2$ )	30		

While the mean ( $x_2$ ) is 2.63 and the number of values in the sample ( $n_2$ ) is 30 as indicated in Table 11, the standard deviation requires further computation.

$$s_2 = \sqrt{\frac{\sum (x - x_2)^2}{n_2 - 1}}$$

$$s_2 = \sqrt{\frac{162.97}{30 - 1}}$$

$$s_2 = 2.63$$

Thus, the standard deviation for the sample for states that initially elect their justices ( $s_2$ ) is 2.63.

With these variables calculated, the next step in testing the hypothesis is determining whether the variances are equal.<sup>46</sup> A preliminary “ $F$  test” is utilized to

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<sup>46</sup> See *id.*

preliminarily determine whether the following hypotheses regarding the equality of the variances of  $\mu_1$  and  $\mu_2$  can be rejected, where  $\sigma_1$  represents the variance for appointed and  $\sigma_2$  represents the variance for elected states:<sup>47</sup>

$$H_0: \sigma_1^2 = \sigma_2^2$$

$$H_1: \sigma_1^2 \neq \sigma_2^2$$

The  $F$  test is the test statistic for hypothesis tests with two variances:

$$F = \frac{s_1^2}{s_2^2}$$

$$F = \frac{(3.49)^2}{(2.37)^2}$$

$$F = 2.17$$

With a numerator degrees of freedom ( $n_1-1$ ) equal to 29,<sup>48</sup> a denominator degrees of freedom ( $n_2-1$ ) equal to 29,<sup>49</sup> and a significance level of 0.025,<sup>50</sup> the critical value which the  $F$  test calculation is measured against is 2.15.<sup>51</sup> Since the  $F$  test falls within the critical region, we reject the null hypothesis.<sup>52</sup> Thus, we reject the claim that the two variances are equal.<sup>53</sup>

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<sup>47</sup> See *id.* at 427-32.

<sup>48</sup> See *id.* at 429.

<sup>49</sup> See *id.*

<sup>50</sup> A significance level of 0.025 amounts to a 95% confidence level. See *id.* at 289.

<sup>51</sup> See *id.* at Appendix A, Table A-5.

<sup>52</sup> See *id.* at 432.

<sup>53</sup> See *id.*

Because the equality of variances has been rejected, the assumption is that the variances are unequal.<sup>54</sup> Therefore, the test statistic ( $t$ ) for independent samples and unequal variances is applied.<sup>55</sup>

$$t = \frac{(x_1 - x_2) - (\mu_1 - \mu_2)}{\sqrt{\frac{s_1^2}{n_1} + \frac{s_2^2}{n_2}}}$$

$$t = \frac{(2.87 - 2.63) - (0)}{\sqrt{\frac{(3.49)^2}{30} + \frac{(2.37)^2}{30}}}$$

$$t = \frac{0.24}{\sqrt{0.41 + 0.19}}$$

$$t = 0.31$$

For a 0.05 two tails significance level, and a degrees of freedom of 29, the critical region is comprised of all values outside of the region between  $t = 2.045$  and  $t = -2.045$ .<sup>56</sup> As the test statistic ( $t$ ) does not fall within the critical region, there is not sufficient

<sup>54</sup> See *id.* at 443.

<sup>55</sup> See *id.*



evidence to warrant rejection of the null hypothesis.<sup>57</sup> Thus, it appears that states that initially appoint their high court justices and states that initially elect their high court justices, have the same average of supreme court opinions overturning supreme court precedent each year.

2. *Do States That Initially Elect Their Supreme Court Justices Overrule A Greater Proportion of Civil Versus Criminal Prior State Supreme Court Precedent Than States That Initially Appoint Their Supreme Court?*

Inferences about two proportions from two independent sets of sample data can be made.<sup>58</sup> For our purposes, in this analysis the states that initially appoint their justices will be sample 1 and states that initially elect will be sample 2. The null and alternative hypotheses are:

$$H_0: p_1 = p_2$$

$$H_1: p_1 \neq p_2$$

For our analysis, the following variables will be used: population proportion ( $p_1$  and  $p_2$ ), size of the sample ( $n_1$  and  $n_2$ ), number of civil cases in the sample ( $x_1$  and  $x_2$ ), the sample proportion ( $p_{01}$  and  $p_{02}$ ), the complement sample proportion ( $q_{01}$  and  $q_{02}$ ), and the pooled estimate of  $p_1$  and  $p_2$  ( $p_{12}$ ) and its complement ( $q_{12}$ ). Derived from the data in Table 8, each of the values for  $n_1$ ,  $n_2$ ,  $x_1$ ,  $x_2$ ,  $p_{01}$ ,  $p_{02}$ ,  $q_{01}$ ,  $q_{02}$ ,  $p_{12}$ , and  $q_{12}$  are as follows:

$$n_1 = 86$$

$$x_1 = 47$$

$$p_{01} = x_1/n_1 = 47/86 = 0.55$$

$$q_{01} = 1 - p_{01} = 1 - 0.55 = 0.45$$

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<sup>56</sup> See *id.* at Appendix A, Table A-3.

<sup>57</sup> See *id.* at 444.

$$n_2 = 78$$

$$x_2 = 48$$

$$p_{02} = x_2/n_2 = 48/78 = 0.62$$

$$q_{02} = 1 - p_{02} = 1 - 0.62 = 0.38$$

$$p_{12} = \frac{x_1 + x_2}{n_1 + n_2} = \frac{95}{164} = 0.58$$

$$n_1 + n_2 = 164$$

$$q_{12} = 1 - p_{12} = 1 - 0.58 = 0.42$$

With a null hypothesis of  $p_1 = p_2$ , the test statistic  $z$  is utilized.<sup>59</sup> Using the variables calculated above,

$$z = \frac{(p_{01} - p_{02}) - (p_1 - p_2)}{\sqrt{\frac{(p_{12})(q_{12})}{n_1} + \frac{(p_{12})(q_{12})}{n_2}}}$$

$$z = \frac{(0.55 - 0.62) - (0)}{\sqrt{\frac{(0.58)(0.42)}{86} + \frac{(0.58)(0.42)}{78}}}$$

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<sup>58</sup> See *id.* at 451-57.

<sup>59</sup> See *id.* at 453.

$$z = \frac{-0.07}{\sqrt{\frac{0.24}{86} + \frac{0.24}{78}}}$$

$$z = \frac{-0.07}{0.077}$$

$$z = -0.91$$

With a two-tailed test with a level of significance equal to 0.025 in each tail,<sup>60</sup> the critical values for  $z$  are  $z = -1.96$  and  $z = 1.96$ .<sup>61</sup> As the test statistic ( $z$ ) does not fall within the critical region, there is not sufficient evidence to warrant rejection of the null hypothesis, that  $p_1 = p_2$ .<sup>62</sup> Therefore it appears that states that initially appoint their high court justices and states that initially elect their high court justices, do not differ as to proportion of supreme court opinions overturning supreme court precedent each year that are civil as opposed to criminal in nature.

3. *Are States That Initially Elect Their Supreme Court Justices More Likely to Overrule Prior State Supreme Court Precedents That Are More Recent Than States That Initially Appoint Their Supreme Court Justices?*

Again, inferences about two proportions from two independent sets of sample data can be made.<sup>63</sup> For our purposes, in this analysis the states that initially appoint their

<sup>60</sup> A significance level of 0.025 amounts to a 95% confidence level. See *id.* at 289.

<sup>61</sup> See *id.* at 455; see also *id.* at Appendix A, Table A-2.

<sup>62</sup> See *id.* at 455.

<sup>63</sup> See *id.* at 451-57.

justices will be sample 1 and states that initially elect will be sample 2. The hypotheses are:

$$H_0: p_1 = p_2$$

$$H_1: p_1 \neq p_2$$

For our analysis, the following variables will be used: population proportion ( $p_1$  and  $p_2$ ), size of the sample ( $n_1$  and  $n_2$ ), number of overturned cases decided in the ten years prior to the overruling case in the sample ( $x_1$  and  $x_2$ ), the sample proportion ( $p_{01}$  and  $p_{02}$ ), the complement sample proportion ( $q_{01}$  and  $q_{02}$ ), and the pooled estimate of  $p_1$  and  $p_2$  ( $p_{12}$ ) and its complement ( $q_{12}$ ). Derived from the data in Table 12, each of the values for  $n_1$ ,  $n_2$ ,  $x_1$ ,  $x_2$ ,  $p_{01}$ ,  $p_{02}$ ,  $q_{01}$ ,  $q_{02}$ ,  $p_{12}$ , and  $q_{12}$  are as follows:

**Table 12. Overruled Cases and Their Ages**

	Selection Method	Cases Overruled	Cases With Age < 10 years
Illinois	Election	15	8
Indiana	Appointment	50	24
Iowa	Appointment	28	11
Mass.	Appointment	2	1
Michigan	Election	33	13
Minnesota	Election	7	3
Nebraska	Appointment	86	49
New York	Appointment	7	0
North Dakota	Election	9	4
Ohio	Election	24	7
South Dakota	Appointment	8	3
Wisconsin	Election	18	6
	Total Elected	106	41
	Total Apptd.	181	88

$$n_1 = 181$$

$$x_1 = 88$$

$$p_{01} = x_1/n_1 = 88/181 = 0.49$$

$$q_{01} = 1 - p_{01} = 1 - 0.49 = 0.51$$

$$n_2 = 106$$

$$x_2 = 41$$

$$p_{02} = x_2/n_2 = 41/106 = 0.39$$

$$q_{02} = 1 - p_{02} = 1 - 0.39 = 0.61$$

$$p_{12} = \frac{x_1 + x_2}{n_1 + n_2} = \frac{129}{287} = 0.45$$

$$q_{12} = 1 - p_{12} = 1 - 0.45 = 0.55$$

With a null hypothesis of  $p_1 = p_2$ , the test statistic  $z$  is utilized.<sup>64</sup> Using the variables calculated above,

$$z = \frac{(p_{01} - p_{02}) - (p_1 - p_2)}{\sqrt{\frac{(p_{12})(q_{12})}{n_1} + \frac{(p_{12})(q_{12})}{n_2}}}$$

$$z = \frac{(0.49 - 0.39) - (0)}{\sqrt{\frac{(0.45)(0.55)}{181} + \frac{(0.45)(0.55)}{106}}}$$

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<sup>64</sup> See *id.* at 453.

$$z = \frac{0.10}{\sqrt{\frac{0.25}{181} + \frac{0.25}{106}}}$$

$$z = \frac{0.10}{0.061}$$

$$z = 1.64$$

With a two-tailed test with a level of significance equal to 0.025 in each tail,<sup>65</sup> the critical values for  $z$  are  $z = -1.96$  and  $z = 1.96$ .<sup>66</sup> As the calculated test statistic ( $z$ ) does not fall within the critical region which is outside of the critical values, there is not sufficient evidence to warrant rejection of the null hypothesis, that  $p_1 = p_2$ .<sup>67</sup> Therefore it appears that states that initially appoint their high court justices and states that initially elect their high court justices, do not differ as to the proportion of supreme court opinions overturning supreme court opinions that were issued within the previous ten years.

## V. CAUTIOUS DEDUCTIONS

As discussed previously, there are a multitude of variables that influence the factors that are the subject of this study.<sup>68</sup> Since these variables are extremely problematic or even impossible to measure, it is difficult to verify this study as assuredly

<sup>65</sup> A significance level of 0.025 amounts to a 95% confidence level. *See id.* at 289.

<sup>66</sup> *See id.* at 455; *see also id.* at Appendix A, Table A-2.

<sup>67</sup> *See id.* at 455.

<sup>68</sup> *See supra* Part III.C.



statistically significant. Again, "court opinions are not discrete quanta of data like, say, election returns."<sup>69</sup>

Yet with due deference to the limitations of the survey, given the procedural safeguards and statistical preciseness invoked by this study, one can draw the following conclusions from this research:

**There Appears To Be Very Little Variance, If Any, Between the Likelihood Of A State Supreme Court To Overrule Precedent Due To A State's Initial Judicial Selection Method**

This study examined the number of overruling state supreme court cases by twelve state supreme courts, for the years 1995-1999. Six of these states initially elect their high court justices, while six initially appoint their high court justices through merit selection commissions. A statistical analysis was then done, comparing the mean number of overruling cases for each state for each of the years being surveyed.

At a 95% confidence level, the statistical computation indicates that there is insufficient evidence to reject the hypothesis that the mean number of overruling cases per year for initially elected state supreme courts is equal to the mean number of overruling cases per year for initially appointed state supreme courts. Therefore, withstanding considerations of unmeasured variables, one can draw the conclusion that there is little, if any, difference in the volatility of a state supreme court due to the method used to initially select state supreme court justices.

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<sup>69</sup> PINELLO, *supra* note 2, at 23.

**There Appears To Be Very Little Variance, If Any, Between the Type of Overruling Cases Due To A State's Initial Judicial Selection Method**

This study examined the subject type, either criminal or civil, of overruling state supreme court cases by twelve state supreme courts, for the years 1995-1999. Six of these states initially elect their high court justices, while six initially appoint their high court justices through merit selection commissions. A statistical analysis was then done, comparing the proportion of criminal to civil overruling cases for each state for the period of years being surveyed.

At a 95% confidence level, the statistical computation indicates that there is insufficient evidence to reject the hypothesis that the proportion of civil overruling cases per year for initially elected state supreme courts is equal to the proportion of civil overruling cases per year for initially appointed state supreme courts. Therefore, withstanding considerations of unmeasured variables, one can draw the conclusion that there is little, if any, difference in the type of overruling cases per year due to the method used to initially select state supreme court justices.

**There Appears To Be Very Little Variance, If Any, Between the Age of Overruled Cases Due To A State's Initial Judicial Selection Method**

This study examined the age of state supreme court cases overruled by twelve state supreme courts, for the years 1995-1999. Six of these states initially elect their high court justices, while six initially appoint their high court justices through merit selection commissions. A statistical analysis was then done, comparing the proportion of overruled cases that were decided within the previous ten years, for each state for the period of years being surveyed.

At a 95% confidence level, the statistical computation indicates that there is insufficient evidence to reject the hypothesis that the proportion of overruled cases decided in the previous ten years for initially elected state supreme courts is equal to the proportion of overruled cases decided in the previous ten years for initially appointed state supreme courts. Therefore, withstanding considerations of unmeasured variables, one can draw the conclusion that there is little, if any, difference in the age of overruled cases due to the method used to initially select state supreme court justices.

#### CONCLUSION

Due to the method used to initially select judges to the state supreme court's, between states that elect and states that appoint through a merit selection commission, there is very little, if any, difference in volatility. Additionally, there is very little, if any, difference in the subject types of overruling cases or the age of overruled cases, due to the method used to initially select state supreme court justices.